IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 423

TOM COOPER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

Petition for a Writ of Certiorari to the Superior Court of the State of California, in and for the County of Los Angeles, Appellate Department.

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To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles, entered in the above-entitled case on June 30, 1958.

I.

Opinions Below.

The Appellate Department issued an unreported memorandum decision which is appended hereto as Appendix "A". The Municipal Court did not render any written opinion.

II.
Jurisdiction.

The judgment of the Appellate Department was entered June 30, 1958. A timely petition for rehearing was denied on July 8, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

III.
Questions Presented.

1. Whether the search and seizure herein allegedly made incidental to a lawful arrest, violated the provisions of the Fourth Amendment and the self-incrimination and due process provisions of the Fourteenth Amendment.

2. Whether an indiscriminate, ransacking and all-inclusive search and seizure can be justified within the provisions of the Fourth Amendment and the self-incrimination and due process clauses of the Fourteenth Amendment on the ground that it was simply incidental to a lawful arrest.

3. Whether police officers may, under a warrant for arrest, carry out a widespread, indiscriminate search and seizure of all items on a businessman's premises and totally unrelated to the commission of the crime for which the warrant is being served without violating the provisions of the Fourth Amendment and the self-incrimination and due process clauses of the Fourteenth Amendment.

IV.
Constitutional Provisions and Statutes Involved.

The pertinent constitutional provisions and statutes involved are appended hereto as Appendix "B".

V.

Statement of the Case.

1. Petitioner was convicted of violation of Section 311.3 of the Penal Code of the State of California, and Section 4101.1 of the Municipal Code of the City of Los Angeles.

2. The case was tried in the Municipal Court before the judge without a jury. Defendant was convicted and sentenced to serve six months in the County Jail of Los Angeles County.

3. During the trial there was submitted into evidence over petitioner's objections photographs and films which served as the basis for the conviction of the defendant. Petitioner objected to the admission of the testimony upon the ground that pictures and films were seized in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States. Motions and objections on constitutional ground were made at all stages of the proceedings, and all such motions and objections were denied and overruled. The validity of the search and seizure of the evidence without which no conviction of the defendant could have been sustained is the sole issue on this petition, and the facts material to the consideration of that issue are set forth below.

4. On the 16th day of December, 1957, around the hour of 5 P.M. Officer DeKamp and Officer Milburn arrived at the photographic studio operated by petitioner on a busy Los Angeles street, with a warrant for the arrest of the petitioner for violation of Section 702 of the Welfare and Institutions Code of the State of California.[1] It should be noted that this was a regular photo-

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[1]A charge for which the petitioner was later acquitted in the Superior Court of the County of Los Angeles.

graphic studio, open to the public for all types of professional photographs including weddings, portraits, passports, etc. Officer DeKamp showed petitioner a photograph and asked appellant if he knew the girl depicted therein. Petitioner stated that he did and that he had previously photographed the girl. He was informed that the officers had a warrant for his arrest and the officers immediately set about on their indiscriminate search of the premises.

5. Conflicting testimony was offered as to the exact time, but all witnesses agreed that very soon after their arrival, the officers telephoned to the Police Building in downtown Los Angeles and requested that a truck be sent to the premises of the petitioner for the purpose of taking to the Police Building all of petitioner's stock-in-trade, pictures, negatives, check books, personal files, and all other movable objects on the premises with few exceptions. The petitioner and an employee both testified that this telephone call took place within five minutes after the arrival of the officers at the premises and before they had discovered any pictures of an alleged improper nature. The officers testified that the telephone call was made about 20 to 25 minutes later, and after they had discovered at least one allegedly improper photograph.[2]

6. Officer DeKamp admitted that within five minutes after their arrival on the premises they commenced removing items from the shelves [R. p. 20] and justified the wholesale removal of the possession of the petitioner from the premises on the ground that, "We didn't have time to go through all of the photographs" [R. p. 31]

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[2]Petitioner of course denies that any improper pictures were ever in fact found on his premises or among his belongings.

and that, "Like I said before, we didn't have time to go through every one individually" [R. p. 32].

The officers conceded that they "cleaned out his files" because "we couldn't—like I say—go through every individual piece of paper to determine whether her name was on it, so we just took it all" [R. p. 33].

One officer was quoted as saying, "Well, there is too much here for the car, call the truck" [R. p. 72].

The officers removed the entire contents of petitioner's shop, including all of his business records, check books, file cabinets, income tax reports, wedding photographs, passport photographs and all other movable items, and removed them to the Police Building without giving to the petitioner any receipt or listing of the items so removed. The officers conceded that they thereafter examined the entire materials in their leisure at the Police Building to determine whether or not any violation of the law had occurred.

7. From this truckload of materials removed from petitioner's premises only three groups of photographs and four small reels of 16 mm. film were introduced into evidence. The officers conceded that they had not had an opportunity to look at any of the motion picture film until they got to the Police Building, and therefore obviously were unable to determine, while on petitioner's premises, whether this film was illegal under the laws of the State of California or the City of Los Angeles. Of the three groups of photographs, the Court indicated that one group, consisting of pictures of the girl involved in the original search warrant matter, was not improper and would not have served as a basis for the conviction of the petitioner. This left only two groups of photo-

graphs from the entire truckload seized on petitioner's premises which became the basis for conviction of the petitioner.

8. One independent witness testified that she arrived on the premises at or about the same time as the arrival of the police truck and spoke with one of the officers at that time, who informed her that he had not found any "pictures that were bad or anything like that" as of that time. This independent testimony would seem to verify the fact that the officers had called the truck for the removal of the entire contents of petitioner's premises before determining that there was anything improper to be found on the premises or among petitioner's belongings.

VI.

Reasons for Granting of Writ.

1. This case poses fundamental questions relating to the law of search and seizure which are either undetermined by this Court in previous decisions or are, by this decision of the Appellate Department of the Superior Court of Los Angeles County, being subjected to new and restrictive interpretations contrary to the spirit and intent of those prior decisions of this Court setting forth the fundamental rights of citizens to be free from improper searches and seizures.

2. The Court below has decided, in upholding the conviction of the petitioner herein, that police officers armed with a warrant of arrest, may as an incident to that arrest make a ransacking, widespread search of the premises of the defendant, remove all of his belongings of every nature whatsover whether related to the crime for which he is being arrested or not, and in the quiet of the Police Buliding search for evidence of other crimes

with which to charge the defendant. A decision permitting this type of ransacking search would seem to be contrary to previous decisions of this Court, and should be reversed as violative of the constitutional rights of the petitioner as set forth in the Fourth, Fifth and Fourteenth Amendments to the Constitution.

3. It is true that this Court has in the past held that a search truly made as an incident to a lawful arrest may not be violative of the Fifth Amendment, but it is submitted that the breadth, extent and intent of the search made in this case go beyond any factual situation passed upon by this Court in connection with the aforesaid rule.

4. An arrest may not be used as a pretext for a search for evidence of other crimes.

In this case, the record discloses that the arresting officers were in fact not interested in making a search for evidence relating to the crime for which the petitioner was arrested, but that their sole thought, intent, purpose and activity after arriving on the premises was to indiscriminately search and ransack in an effort to disclose evidence of other crimes for which additional criminal charges could be lodged against the petitioner.

This objective is indicated by the entire record, including much of the testimony of the police officers themselves.

First it should be noted that the crime for which the plaintiff was arrested was contributing to the delinquency of a minor. The gist of this charge was that he had as a professional photographer photographed in the nude a girl under the age of twenty-one. The officers came to the premises of the petitioner with prints of such pic-

tures, and the petitioner readily admitted on their arrival that he had so photographed the girl. If the act of taking this photograph was criminal under the laws of the State of California, the officers had their evidence at that time and needed nothing further by way of search and seizure in order to secure a conviction of the defendant. The fact is that the defendant was later acquitted of the charge, indicating that there was no justification for the issuance of the original warrant of arrest. Furthermore, the search and seizure disclosed nothing more than additional prints of the photographs which the officers had initially brought with them to the premises relating to this alleged crime.

5. The search of the premises of the defendant as an incident to a lawful arrest must be reasonable and must be directly related to the purpose of the arrest. (*United States v. Lefkowitz*, 285 U. S. 452.) In this case, neither of these qualifications was met since there was no justification for the search, and as shall be pointed out hereafter, the actual purpose of the search was other than that stated by the officers.

6. We then come to an examination of the obvious purpose of the officers in their visit to the premises of the petitioner.

The police officer himself admitted that within four to five minutes of their arrival, they started removing items from the shelves [R. p. 20] corroborating the testimony of Kay White to the effect that almost immediately after they arrived the officers started putting all of the contents of the place into the center of the room [R. p. 124] preparatory to placing it in boxes for removal to a truck and thence to the Police Building.

Within approximately five minutes (and at longest even according to the police officers, within twenty to twenty-five minutes) of their arrival on the premises, the officers called to the Police Building to have a truck come to the premises for the purposes of taking all of the items on the premises, including check books, personal pictures, personal files and records, income tax records, wedding photographs, and all other movable items on the premises, to the Police Building for the purpose of making an exhaustive search to determine whether there were any violations of the law contained among these items.

Both Tom Cooper [R. p. 73] and Kay White [R. p. 124] testified that the phone call for the truck took place within five minutes, and while there is some conflict between this and the officers' testimony, the objective facts would seem to corroborate the testimony of Cooper and White. An independent witness testified that the truck actually arrived on the premises at approximately 5:30 [R. p. 104]. The officers arrived at the premises initially between 4:45 and 5:00 o'clock. After the police called for the truck, a driver had to be secured and the truck had to come from downtown Los Angeles to Hollywood—a distance of some eight miles—at the height of the traffic hour. If the initial police call was made even fifteen or twenty minutes after the arrival of the police, the truck could not possibly have arrived at the premises by 5:30. One can only logically conclude that the call for the truck must have been made immediately after arrival at the premises.

By the time the truck arrived at the premises, all of the contents of the shop were in the center of the room in boxes preparatory to being carted out of the premises, to be looked over at leisure at the Police Building [R. p. 108].

The officers' explanation of the reason why they were carting out the materials is epitomized by the prosecutor who summarized the attitude of the police officers by observing that "he did not have time to sort through the pictures, and that resulted in their removing great quantities of pictures, and I think that the volume involved indicates that there was *no time to sort*" [R. p. 30]. (Emphasis added.)

The attitude of the officers and the statements attributed to them by the petitioner to the effect that they were going to "put him out of business" [R. p. 85] further indicate that the purpose of the search and seizure in this case was totally unrelated to the warrant of arrest, and therefore cannot be justified as an incident to a lawful arrest.

Examined for a moment the testimony of Cooper regarding the magnitude of the search:

> Q. Now, will you tell us, Mr. Cooper, what items and the extent of the items that were removed from your premises by Officer Milburn and Officer De Camp on this day? A. They removed every picture and every negative in the place with the exception of about 40 boxes of wedding negatives which I asked him to leave. That is the only thing he would leave. He took every book, every paper, all my income tax returns from the last 10 years, my old checks from 10 years ago, everything.
>
> Q. Phone books? A. Phone books.
>
> Mr. Iler: Just a moment, just a moment. I object to the suggestion by counsel.
>
> The Court: Leading and suggestive.
>
> Mr. Mosk: Well, I suppose it is, your Honor.
>
> Q. (By Mr. Mosk): All right, will you recount any other things that you can recall that were re-

moved? A. All my past mail order, all the empty envelopes, all the sealed orders, all the current orders, all my mail that had come in the past week that hadn't even been sorted without any discrimination, just threw everything in boxes.

Q. And where were those things taken so far as you know at that date? A. They put them on this truck and we followed the truck. I rode in the officers' car down to the Police Building.

Q. Were you given any sort of a list or receipt for the things that were taken from you? A. I was given nothing.

Q. Have you ever been given any sort of a receipt for the list of things that were taken from you? A. I went back and got my check book and I signed a receipt that I received it.

Q. That is the only item that has been returned to you as of this date? A. The only item that has been returned to me personally.

7. The officers in this case had plenty of time by their own admission to secure a search warrant [R. p. 18]. Since they failed so to do, the burden of showing "good faith and reasonableness of the search" fell on the prosecution (*McDonald v. United States*, 335 U. S. 451). The officers cannot justify their ransacking seizure of every movable item on the petitioner's premises by the existence of a warrant for arrest when the facts indicate that the intention to remove every item from the premises existed before the search began. It is obvious that the intention of the officers from the first moment was to take all of the items on the petitioner's premises to the Police Building for a leisurely examination to determine whether some other violation of the law had taken place. Under these circumstances, the prosecu-

tion cannot fall back upon the existence of a warrant for arrest as the legal basis.

8. The warrant for arrest allows only a search incidental to the arrest, and it must be in good faith related to the arrest. It cannot be an exploratory search (*United States v. Leftkowitz*, 285 U. S. 452; *Gobart Importing Co. v. United States*, 282 U. S. 344).

9. Nor is the prosecution's case aided by the fact that they did, in fact, find a few objects which the Court ultimately found to be illegal. Aside from the fact that there was a dispute in the evidence as to whether any of these items in fact were found on the premises.[a]

The basic principle has long been established that the search whether incident to an arrest or not, cannot be justified by what turns up (*Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 40 S. Ct. 182). Therefore here, even if the items upon which the conviction was based were in fact found on the premises, if the original search and the ultimate seizure were improper, as contended by the petitioner, the conviction must, under the Fifth and Fourteenth Amendments, be reversed.

In this connection, it should be noted that the exhibits upon which the conviction was based consisted of three groups of photographs [Exs. 1, 2 and 3], and four reels of 16 mm. film [Exs. 4, 5, 6 and 7]. All of the re-

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[a]A factor which could have been obviated by the securing of a search warrant, since the California law (Penal Code, Sec. 1535) requires that where objects are seized in connection with a search warrant a receipt must be given showing in detail the objects so seized. Since in this case the objects were not seized in connection with a search warrant, no receipt was given to the petitioner, [R. p. 48] making it impossible for the petitioner to corroborate his contention that the items which were introduced into evidence against him were in fact not found on his premises.

mainder of the exhibits were solely for purposes of identification of objects, handwriting or other matters not going to the gist of the charge against the petitioner. It should be noted that the four reels of film could not have been determined to be improper or illegal until they were taken to the Police Building by the officers. The officers conceded that they did not look at these films until they took them to the Police Building [R. p. 17]. Of the remaining three groups of photographs, one [Ex. 2] consisted of pictures of the girl involved in the charge for which the warrant of arrest was issued. These the Court held were not improper or obscene. This left only two small groups of pictures out of the entire truckload as the basis for the charge, and with regard to these pictures there is a conflict in the testimony as to whether they were in fact found on the premises of the petitioner.

But there is no dispute as to the fact that in order to find these two small groups of photographs, the police took from the premises of the petitioner practically everything on the premises that was movable, including personal records, personal papers, documents, income tax records, wedding photographs, etc. It is submitted in this connection that the simple magnitude and extent of this seizure itself is violative of the Fifth and Fourteenth Amendments (*Kremen v. United States*, 353 U. S. 346).

VII.

Conclusion.

The record here discloses a calculated plan on the part of the police officers to secure by the device of a warrant for the arrest of the defendant the opportunity at their leisure to ransack and examine all of the properties of the petitioner found on his premises.

This the officers desired to do at their leisure rather than taking the time to do it in connection with the arrest; and therefore they secured a truck to take all of petitioner's properties with them to the Police Building. This action is indistinguishable from the arrest under warrant of a bookseller on the ground that he had sold a single book believed by the police to be pornographic; and when serving the warrant, the removal of every book in the store for the purpose of allowing the police officers to read these books at their leisure at the Police Building in order to determine whether there existed among these books others which might provide the basis for new, additional and further charges to be filed aganist the bookseller.

To allow such power to remain in the hands of the police would, in addition to giving power to bankrupt a defendant, provide the police with a legalized basis for ignoring the existence of the Fifth and Fourteenth Amendments to the Constitution of the United States. The decision of the Court below, since it sanctions such action by the police, is violative of petitioner's rights under the Constitution, and therefore this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

EDWARD MOSK,

Attorney for Petitioner.

APPENDIX "A".

Memorandum Decision.

In the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Superior Court No. CR A 3827.

Trial Court No. 76917.

People of the State of California, Plaintiff and Respondent, vs. Tom Cooper, Defendant and Appellant.

On Appeal from the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California. David W. Williams, Judge.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is Ordered and Adjudged that the judgment and order denying motion for new trial made and entered in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same are hereby affirmed; the appeal from other orders is dismissed.

Memo.

The police went to defendant's place of business to arrest him under a warrant charging that he contributed to the delinquency of a minor, the essence of which involved "art modeling" for his photographs. The officers searched the place, found photographs of the minor and other photographs of a pornographic nature and several lewd and obscene motion picture films, cartons of which bore handwritten captions; and likewise, cancelled checks were seized as handwriting evidence. These were re-

(b) Section 1535 of the Penal Code:

"*Officer to give receipt for property taken.* When
officer takes property under the warrant, he must g
a receipt for the property taken (specifying it in det
to the person from whom it was taken by him, or in wh
possession it was found; or, in the absence of any pers
he must leave it in the place where he found the propert